LIBRARY
SUPREME COURT U. S.

Office-Supreme Court, U.S.
FILED
JAN 4 1969
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1968

No. [redacted] 3

RICHARD ALLEN, ET AL.,

Appellant,

v.

STATE BOARD OF ELECTIONS, ET AL.,

Appellees.

Appeal from the United States District Court for the Eastern District of Virginia

STATEMENT OF APPELLEES OPPOSING JURISDICTION AND MOTION TO AFFIRM

ROBERT Y. BUTTON
Attorney General of Virginia

R. D. MCILWAINE, III
Assistant Attorney General

Supreme Court–State Library Building
Richmond, Virginia 23219

TABLE OF CONTENTS

	Page
PRELIMINARY STATEMENT	1
PRIOR PROCEEDINGS	2
STATEMENT OF FACTS	3
STATUTES INVOLVED	6
QUESTION PRESENTED	7
ARGUMENT	7
Section 24-252 Of The Virginia Code Is Not Violative Of The Fourteenth Amendment To The Constitution Of The United States Or The Voting Rights Act Of 1965	7
CONCLUSION	13

TABLE OF CITATIONS

Cases

Allen v. State Board of Elections, 268 F. Supp. 218	3
Blackman v. Stone, 7 Cir., 101 F. (2d) 500	10
Fletcher v. Wall, 172 Ill. 426, 50 N.E. 230	10
McSorley v. Schroeder, 196 Ill. 99, 63 N.W. 697	10
Roberts v. Quest, 173 Ill. 427, 50 N.E. 1073	10
South Carolina v. Katzenbach, 383 U.S. 301	7

Other Authorities

Code of Virginia (1950):

Section 24-251 ..... 5, 6, 8

	Page
Section 24-252	2, 6, 7, 9
Constitution of the United States:	
Fourteenth Amendment	2, 12
28 U.S.C.A., Sections 1331 and 1343(3), (4)	2
28 U.S.C.A., Sections 2281 and 2284	2
42 U.S.C.A., Section 1973 et seq	2, 11

IN THE

Supreme Court of the United States

October Term, 1967

No. .....

RICHARD ALLEN, ET AL.,

Appellant,

v.

STATE BOARD OF ELECTIONS, ET AL.,

Appellees.

Appeal from the United States District Court for the Eastern District of Virginia

---

STATEMENT OF APPELLEES OPPOSING JURISDICTION AND MOTION TO AFFIRM

PRELIMINARY STATEMENT

By letter of the Honorable John F. Davis, Clerk of the Supreme Court of the United States, dated December 5, 1967, the Attorney General of Virginia was requested to file a response to the appeal taken from an order of the United States District Court for the Eastern District of Virginia denying appellants' request for injunctions and dismissing their complaint. In accordance with the request

contained in the above-mentioned communication,* written by the Clerk at the direction of this Court, the within response is filed. The appellees, believing the matters set forth herein will demonstrate the lack of substance in the questions sought to be presented by this appeal, file this statement in opposition to appellees' jurisdictional statement and include their motion to affirm the judgment of the court below upon the ground that the question on which the decision of this cause depends is so unsubstantial as to obviate further argument.

PRIOR PROCEEDINGS

On November 26, 1966, appellants instituted in the United States District Court for the Eastern District of Virginia this suit for preliminary and permanent injunctions allegedly to restrain the enforcement, operation and execution of Section 24-252 of the Code of Virginia (1950) by restraining the defendant election officials and their successors in office from failing or refusing to count, and from requiring or permitting any other election officials to fail or refuse to count, any vote hereafter given for any person solely because the name of such person was inserted on the official ballot otherwise than in the handwriting of the voter.

Jurisdiction was invoked under 28 U.S.C.A. 1331 and 1343(3), (4); the Voting Rights Act of 1965, 42 U.S.C.A. 1973 *et seq.;* the Fourteenth Amendment to the Constitution of the United States and 28 U.S.C.A. 2281 and 2284—the latter two statutes providing for the convening of a District Court of three judges to hear and determine suits in which restraint of the enforcement of a State statute,

---

* *Post,* Appendix A.

upon the ground of such statute's constitutionality, is sought.

A District Court of three judges having been designated by the Chief Judge of the United States Court of Appeals for the Fourth Circuit, the matter was heard on the merits on April 11, 1967. Subsequently, the District Court rendered its opinion denying the prayer of appellants' complaint and dismissing the suit. See, *Allen* v. *State Board of Elections*, 268 F. Supp. 218. On May 2, 1967, a final order effectuating this opinion was entered. Jurisdictional Statement, Appendix, p. 9a.

STATEMENT OF FACTS

Plaintiffs are citizens of the Commonwealth of Virginia registered to vote in one of the precincts or wards of one of the several counties and cities comprising the Fourth Congressional District of Virginia. Defendants are the State Board of Elections of the Commonwealth of Virginia and various individuals who were, on November 8, 1966, either judges or clerks of election in certain precincts located in Greenville County, Cumberland County and Powhatan County, Virginia.

Plaintiffs allege that, at the general election held on November 8, 1966, they were furnished official ballots on which were printed the names of two candidates for election to the House of Representatives of the United States from the Fourth Congressional District of Virginia. They further allege (1) that they inserted the name "S. W. Tucker" on the official ballot, immediately under the names of the two candidates printed thereon, by pasting on the official ballot a sticker or paster upon which the name "S. W. Tucker" had been printed and (2) that they made a check, cross mark or line on the ballot immediately preceding the name thus inserted and thereafter deposited such ballots in the ballot

boxes. The ballots thus altered or marked were not officially counted or included in the official returns as votes validly cast for the said S. W. Tucker.

On August 6, 1965, the Voting Rights Act of 1965 (Public Law 89-110, 79 Stat. 437) enacted by the Congress of the United States became effective in Virginia. This Act had the effect of suspending literacy tests and similar voting qualifications throughout the Commonwealth for a specified period by prescribing that no person might be denied the right to vote in any election because of his failure to comply with a "test or device" as defined by the statute. As used throughout the Act, the phrase "test or device" means any requirement that a registrant or voter must (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any class.

On August 12, 1965—within a week of the effective date (August 6, 1965) of the Voting Rights Act of 1965—the Honorable Levin Nock Davis, Secretary of the defendant State Board of Elections, sent to all registrars of the Commonwealth of Virginia a bulletin advising them that the Voting Rights Act of 1965 was in force in Virginia and that use of the Virginia registration form in the manner formerly required by Virginia law was prohibited. The above-mentioned bulletin contained the following instructions:

> "The Registrar shall review the forms in the presence of the applicant to insure that all questions are answered clearly and completely. If all questions are not answered clearly and completely, or if the applicant is not able personally to complete the forms in whole or in part because of lack of literacy or otherwise, or has

difficulty in doing so, the Registrar shall orally examine the applicant and record the pertinent information on the forms or otherwise assist the applicant in completing the forms. After the forms are completed, the Registrar shall require the applicant to take an oath or affirmation as to the truth of the answers and to sign his name or make his mark thereon."

Subsequently, on October 15, 1965 Mr. Davis also sent to the general registrars and the secretaries of the various electoral boards throughout the Commonwealth—to be delivered by the latter to all judges of election—a further bulletin which informed and instructed all judges of election that:

"On August 6, 1965, the 'Voting Rights Act of 1965' enacted by the Congress of the United States became effective and is now in force in Virginia. Under the provisions of this Act, any person qualified to vote in the General Election to be held November 2, 1965, who is unable to mark or cast his ballot, in whole or in part, because of a lack of literacy (in addition to any of the reasons set forth in Section 24-251 of the Virginia Code) shall, if he so requests, be aided in the preparation of his ballot by one of the judges of election selected by the voter. The judge of election shall assist the voter, upon his request, in the preparation of his ballot in accordance with the voter's instructions, and shall not in any manner divulge or indicate, by signs or otherwise, the name or names of the person or persons for whom any voter shall vote.

"These instructions also apply to precincts in which voting machines are used."

The instructions contained in the above-mentioned bulletins continue in full force in the Commonwealth so long as the Voting Rights Act of 1965 remains effective in Virginia.

THE STATUTES INVOLVED

Under consideration in the instant proceedings are Sections 24-251 and 24-252 of the Code of Virginia (1950) as amended which provide:

"§ 24-251.—Any person registered prior to the first of January, nineteen hundred and four, and any person registered thereafter who is physically unable to prepare his ballot without aid, may, if he so requests, be aided in the preparation of his ballot by one of the judges of election designated by himself, and any person registered, who is blind, may if he so requests, be aided in the preparation of his ballot by a person of his choice. The judge of election, or other person, so designated shall assist the elector in the preparation of his ballot in accordance with his instructions, but the judge or other person shall not enter the booth with the voter unless requested by him, and shall not in any manner divulge or indicate, by signs or otherwise, the name or names of the person or persons for whom any elector shall vote. For a corrupt violation of any of the provisions of this section, the person so violating shall be deemed guilty of a misdemeanor and be confined in jail not less than one nor more than twelve months."

"§ 24-252.—At all elections except primary elections it shall be lawful for any voter to place on the official ballot the name of any person in his own handwriting thereon and to vote for such other person for any office for which he may desire to vote and mark the same by a check (√) or cross (X or +) mark or a line (—) immediately preceding the name inserted. Provided, however, that nothing contained in this section shall affect the operation of § 24-251 of the Code of Virginia. No ballot, with a name or names placed thereon in violation of this section, shall be counted for such person."

QUESTION PRESENTED

Is Section 24-252 of the Virginia Code violative of the Fourteenth Amendment to the Constitution of the United States or the Voting Rights Act of 1965?

ARGUMENT

Section 24-252 Of The Virginia Code Is Not Violative Of The Fourteenth Amendment To The Constitution Of The United States Or The Voting Rights Act Of 1965.

In the instant case, it is important to realize at the outset that the Virginia statute under attack by appellants—Section 24-252 of the Virginia Code—*has been superseded by the Voting Rights Act of 1965.* With the advent of the Voting Rights Act, which suspended in Virginia any requirement that a voter be able to read, write or understand any matter in registering to vote or in voting, the requirement of Section 24-252 that the inserted name of a "write-in" candidate be in the handwriting of the voter was superseded and was no longer enforceable or enforced in Virginia.

Equally important is it to realize that the above-stated propositions *were conceded by appellees in this case from the beginning*, and no attempt whatever was made to assert the efficacy of the challenged enactment in this regard. On the contrary, appellees established in evidence and emphasized in argument that within a week of the effective date of the Voting Rights Act of 1965—and before the case of *South Carolina* v. *Katzenbach,* 383 U. S. 301, was even instituted in this Court—the defendant State Board of Elections issued a bulletin instructing all registrars to register all persons who were unable themselves to register because of a lack of literacy. *Ante,* p. 4. The language in which this bulletin was couched was transposed almost verbatim from the Federal regulations implementing the Vot-

ing Rights Act, and the substantial identity of language clearly indicates that every effort was made to conform the applicable Virginia law precisely to the requirements of the Federal statute. See, Appendix B, *post*. In addition, on October 15, 1965—some three weeks before the first general election held in Virginia after the effective date of the Voting Rights Act—the defendant State Board of Elections sent to all general registrars and to all secretaries of the various local electoral boards for transmittal to all judges of elections, a further bulletin instructing all judges of elections to render assistance to any voter who was unable to mark or cast his ballot, in whole or in part, because of a lack of literacy. *Ante*, p. 5. As the District Court noted, the instructions contained in these bulletins continue in full force in the Commonwealth so long as the Voting Rights Act of 1965 remains effective in Virginia. Jurisdictional Statement, Appendix, p. 7a.

Despite the requirement of the challenged statute that the inserted name of a "write-in" candidate be placed on the ballot in the handwriting of the voter, provision is made, by the reference to Section 24-251 of the Virginia Code—for the assistance of physically handicapped voters by the judges of election, who are (1) authorized by the latter provision to assist a physically handicapped voter "in the preparation of his ballot in accordance with" the instructions of the voter and (2) forbidden, under penal sanction, from divulging or indicating in any manner, by sign or otherwise, the name or names of the persons for whom any physically handicapped voter cast his ballot. When the Voting Rights Act of 1965 became effective in Virginia, the provisions of Section 24-251 of the Virginia Code were broadened by the instructions of the State Board of Elections to include the educationally handicapped as well as

the physically handicapped within the provisions permitting assistance, and thus render Virginia law consistent with the commands of the Federal statute. These instructions of the State Board of Elections removed from the operative Virginia law any requirement that a person be able to comply with any "test or devite" as defined in the Voting Rights Act.

In light of the foregoing, appellants cannot assert, and did not assert, that they are now required to be able to read or write in order to vote in Virginia, or that they are denied the right to vote for failure to comply with any test or device. With particular reference to the questions presented in the case at bar, Virginia law does not permit stickers or pasters to be utilized by voters in casting or marking their ballots under any circumstances, regardless of the physical or educational condition of the individual voter. In this connection, appellants assert that Section 24-252 of the Virginia Code—*to the extent that it forbids them to utilize stickers or pasters in casting their ballots*—infringes rights secured to them by the Fourteenth Amendment and the Voting Rights Act of 1965.

Initially in this connection, it is significant that no case supportive of appellants' contention can be found. As the District Court pointed out (Jurisdictional Statement, Appendix, p. 3a):

> "The plaintiffs' contention that Section 24-252 violates the Fourteenth Amendment because it discriminates against illiterates is not supported by authority."

However, as the District Court also noted, there is no want of authority upon this point, and decisions sustaining and justifying a legislative determination to forbid the use of stickers or pasters are legion. In this connection, the District

Court observed (Jurisdictional Statement, Appendix, p. 3a):

> "The propriety of stickers is a matter for legislative, not judicial determination. *Arguments for and against their use abound. Stickers have been lauded for facilitating voting and denounced as conducive to fraud and confusion.* Their use has been approved under statutes permitting write-ins. Pace v. Hickey, 236 Ark. 792, 370 S.W. 2d 66 (1963); O'Brien v. Board of Elections Comm'rs, 257 Mass. 332, 153 N.E. 553 (1926); Dewalt v. Bartley, 146 Pa. 529, 24 A. 185, 15 L.R.A. 771 (1892); State on Complaint of Tank v. Anderson, 191 Wis. 538, 211 N.W. 938 (1927). Illinois forbade their use, Fletcher v. Wall, 172 Ill. 426, 50 N.E. 230, 40 L.R.A. 617 (1898), and the constitutionality of this ban has been upheld. Blackman v. Stone, 101 F. 2d 500, 504 (7th Cir. 1939). (Italics supplied.)

Squarely in point is the decision of the United States Court of Appeals for the Seventh Circuit in *Blackman* v. *Stone*, 7 Cir., 101 F. (2d) 500. That case was a class action by certain residents of Illinois challenging various provisions of the election laws of that State. In a series of decisions, the Supreme Court of Illinois had held that the use of stickers or pasters by voters was forbidden. See, *McSorley* v. *Schroeder*, 196 Ill. 99, 63 N.W. 697; *Roberts* v. *Quest*, 173 Ill. 427, 50 N. E. 1073; *Fletcher* v. *Wall*, 172 Ill. 426, 50 N.E. 230. In the *Blackman* case, plaintiffs contended, *inter alia*, that this provision of the Illinois law was violative of the Fourteenth Amendment. Rejecting this contention the Court declared (101 F. (2d) at 504):

> "It is further contended by appellants that section 288 of the law is invalid because it requires all voters

to vote by printed ballots furnished by the State and forbids the use of other ballots or pasters. There is no merit in this contention. *The section is a reasonable expression of the will of the Illinois Legislature, and is not in any manner inconsistent with any provision of the Federal Constitution.* (Italics supplied.)

Equally manifest is it that the statute in question infringes no right secured to the appellants by the Voting Rights Act of 1965. In light of the present status of the election laws of the Commonwealth, previously emphasized in this brief, it cannot be denied that Virginia law now makes ample provision for the educationally handicapped voter to register and cast his ballot. Precisely in this connection, the District Court declared (Jurisdictional Statement, Appendix, pp. 5a, 7a):

> *"No evidence has been presented that Virginia's prohibition of stickers has been administered in a discriminatory manner. It has not been used to disfranchise any class of citizens.*
>
> * * *
>
> "The requirement that a write-in candidate's name be inserted in the voter's handwriting is not a test or device defined in 42 U.S.C. § 1973b(c). The requirement did not preclude the plaintiffs from registering or from voting. *Under present Virginia statutes and regulations of the Board of Elections, an illiterate can cast a valid write-in ballot by enlisting the assistance of a judge of election. No evidence was offered that any judge of election denied any illiterate voter the confidential assistance to which he is entitled."* (Italics supplied.)

It is thus unarguably apparent that no citizen of Virginia, otherwise qualified to vote, is denied the right to vote in any election held in the Commonwealth because of his failure

to comply with any "test or device" as defined in the Voting Rights Act of 1965. Indeed, it is clear that the election laws of Virginia as interpreted and applied by the defendant State Board of Elections since the Voting Rights Act of 1965 became operative in the Commonwealth are fully consistent with all requirements of Federal law.

Essentially in this litigation, appellants assert that they have the right to select the means which they will employ to vote for a "write-in" candidate (i.e., by use of pasters or stickers) regardless of whether or not Virginia law authorizes this method of voting. Apparently, the right exists only in Virginia, for it is clear from the decisional authorities cited by the District Court that the propriety of utilizing stickers or pasters in this fashion is a matter for legislative determination by each State, and statutes of other States barring use of stickers or pasters are not subject to constitutional objection. Thus, as a constitutional proposition at least, appellants' assertion necessarily entails a determination that the Fourteenth Amendment guarantees educationally handicapped voters in Virginia a right which it does not equally secure to educationally handicapped voters in other States.

Implicit in appellants' position is the contention that the right to vote by means of stickers or pasters is a right guaranteed them by the Fourteenth Amendment and the Voting Rights Act of 1965. It is perfectly clear from the decisions of this Court, however—as the District Court pointed out—that the Fourteenth Amendment, *per se*, does not even guarantee an illiterate person the right to vote at all, much less to vote by a method of his own choosing. Moreover, there is obviously nothing in the Voting Rights Act of 1965 or any of its implementing regulations which even remotely suggests that this method of voting is even permissible, much less required, by the Federal statute.

Counsel for appellees submit that the provisions of Virginia law under attack in the instant case abridge no federally protected right of the appellants. Quite to the contrary, Virginia law treats with perfect equality all citizens of the Commonwealth, otherwise qualified to vote, who are unable to cast their ballots in their own handwriting, whether such inability is occasioned by a physical or an educational disability. Surely, a statute which makes such even-handed provision for remedying the deficiencies confronting physically or educationally disabled voters cannot be violative of either the Fourteenth Amendment or the Voting Rights Act of 1965.

CONCLUSION

In light of the foregoing, counsel for appellees submit that the question upon which the decision in this case depends is so unsubstantial as to obviate further argument and that the judgment of the District Court should be affirmed.

Respectfully submitted,

ROBERT Y. BUTTON
Attorney General of Virginia

R. D. MCILWAINE, III
Assistant Attorney General

Supreme Court–State Library Building
Richmond, Virginia 23219

CERTIFICATE OF SERVICE

I, R. D. McIlwaine, III, an Assistant Attorney General of Virginia, a member of the Bar of the Supreme Court of the United States and one of the counsel for appellees in

the above-captioned matter, hereby certify that copies of this Statement of Appellees Opposing Jurisdiction and Motion to Affirm have been served upon each of counsel of record for the parties herein by depositing the same in the United States Post office, with first-class postage prepaid, this 4th day of January, 1968, pursuant to the provisions of Rule 33(1) of the Rules of the Supreme Court of the United States, as follows: Jack Greenberg, Esq. and James M. Nabrit, III, Esq., 10 Columbus Circle, New York, New York 10019, and Oliver W. Hill, Esq., S. W. Tucker, Esq., Henry L. Marsh, III, Esq., and Harold M. Marsh, Esq., 214 East Clay Street, Richmond, Virginia 23219, counsel for appellants

.....

Assistant Attorney General

APPENDIX "A"

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C. 20543

December 5, 1967

The Honorable Robert Y. Button
Attorney General of Virginia
Supreme Court Building
Richmond, Virginia 23219

RE: ALLEN ET AL., V. STATE BOARD OF ELECTIONS ET AL.
No. 661, October Term, 1967

Dear Sir:

An appeal was filed in this Court on September 28, 1967, in the above-entitled case, and my records indicate that you were served with a copy of the jurisdictional statement.

I have been directed by the Court to request that you file a response in this case. Such a response usually takes the form of a motion to dismiss or affirm. Forty printed copies of such a motion, together with proof of service thereof, should reach this office on or before January 4, 1968.

On December 4 the Court entered an order inviting the Solicitor General to file a brief expressing the views of the United States in this case.

Very truly yours,

JOHN F. DAVIS, Clerk
By /s/ E. P. CULLINAN
E. P. Cullinan
Chief Deputy.

EPC:jmh
cc: Jack Greenberg, Esq.
10 Columbus Circle
New York, N. Y. 10019

APPENDIX "B"

FEDERAL REGISTER
VOLUME 30—NUMBER 152
August 7, 1965
Title 45—Chapter 8
CIVIL SERVICE COMMISSION
PART 801—VOTING RIGHTS PROGRAM

§ 801.203. *Procedures for filing application.*

(a) An applicant may obtain an application at the place and during the times set out in Appendix A for the appropriate political subdivision. An application may be completed only at the place where it was obtained and shall be submitted by the applicant in person to an examiner at that place.

(b) An examiner shall review the application in the presence of the applicant to insure that all questions are answered clearly and completely. If all questions are not answered clearly and completely or if an applicant is not able personally to complete the application in whole or in part because of lack of literacy or otherwise, or has difficulty in doing so, an examiner shall orally examine the applicant and record the pertinent information on the application or otherwise assist the applicant in completing the application.

(c) After an application is completed, an examiner shall require the applicant to take the oath or affirmation prescribed on the application and to sign his name or make his mark thereon.